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Supreme Court, U.S.
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No. 00-936

In The

Supreme Court of the United States

JODI MICHAELE CARLSON,

Petitioner,

v.

HYUNDAI MOTOR COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The Eighth Circuit made a commonplace procedural ruling in an unpublished decision, holding that Rule 60(b) does not compel a district court to vacate a "non-pending case's judgment" (petitioner's own description here, Pet. 9) based on new law that on its face applies only to "pending" cases. Indeed, Petitioner's Rule 60(b) motion was self-canceling: had an action been "pending," petitioner would not need to invoke Rule 60(b).

Petitioner conjures three issues out of that ruling, but none is an issue at all, much less appropriate for review. The first and second issues involve a fact-bound exercise of discretion, and essentially posit an absurd proposition: that a trial court has a Rule 60(b) duty to rewrite state law to apply to a case to which, on the statute's face, it does not apply. No case has held that, with good reason; it is settled law that federal courts follow, not fashion, state law, and have no discretion to do otherwise.

As to the third issue (relating to the constitutionality of the earlier Minnesota law, Minnesota Statute § 169.685), it is not properly before this Court twice over: (1) no constitutional issue ever was raised in the Court of Appeal; and (2) petitioners did not timely tender it to this Court in any event.

The Petition should be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case leaves out key facts that show why certiorari is inappropriate. Here is the complete story:

The underlying action in this case was filed in 1996, claiming a defective seat belt. (Petitioner's Appendix ("Pet. App.") A-1) On June 16, 1997, the district court dismissed petitioner's complaint on the grounds that, under settled Minnesota law,[1] petitioner's claims would require evidence about seat belt use and installation, which was barred by Minn. Stat. § 169.685. (Pet. App. A-1)

Petitioner appealed to the Eighth Circuit Court of Appeals. She did not challenge the statute's application to her case, nor its constitutionality. To the contrary, she conceded the trial court "appropriately dismissed her seat belt allegations" but argued "the court abused its discretion by dismissing her claims without inviting her to amend the complaint. . . . " *See Carlson v. Hyundai Motor Co.*, 164 F.3d 1160, 1162 (8th Cir. 1999).

On January 15, 1999, the Eighth Circuit affirmed. *See Carlson*, 164 F.3d 1160. Petitioner rehashed her arguments in a petition for rehearing and rehearing *en banc*. Although she was actively lobbying for legislative change

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[1] *See Olson v. Ford Motor Co.*, 558 N.W.2d 491 (Minn. 1997); *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 412 (Minn. Ct. App. 1998); *Schlotz v. Hyundai Motor Co.*, 557 N.W.2d 613 (Minn. Ct. App. 1997), *rev. den.* (Minn. Mar. 26, 1997), *cert. den.*, 118 S.Ct. 80 (1997); *Anker v. Little*, 541 N.W.2d 333 (Minn. Ct. App. 1995), *rev. denied* (Minn. Feb. 9, 1996).

at the time, her petition made no mention of any impending change of law, nor raised any constitutional challenge to the existing law. The petitions were denied on March 5, 1999. (Pet. App. A-17)

Petitioner did not ask for a stay of the mandate, much less make the required showing that, in this case involving state law, a certiorari petition "would present a substantial question." F.R.A.P. 41(d)(2)(A). The mandate accordingly issued on March 15, 1999. (Pet. App. A-19) The judgment of the Court of Appeals was received and filed by the district court on March 17, 1999. (Pet. App. A-19)

Petitioner did not seek to recall the mandate pending legislative changes. She also did not file a certiorari petition. To the contrary, she let the time run, then moved for an extension of time to petition for certiorari. This Court advised her that the time to file a petition had already run, and that "[w]hen the time to file a petition for a writ of certiorari in a civil case has expired (including any habeas action), the Court no longer has the power to review the petition or to consider an application for an extension of time to file the petition." *See* Letter of Clerk of Supreme Court, dated June 7, 1999, Docket No. 98-5-0078. She moved to file a petition out of time anyway – a petition that raised, for the first time, a constitutional challenge to the Minnesota statute. Indeed, the untimely petition contained, verbatim, the argument presented in the third issue here. The Court denied the motion and refused to file the untimely petition. *Carlson v. Hyundai Motor Co.*, 527 U.S. 1033, 119 S.Ct. 2389 (June 24, 1999) ("Motion to direct the Clerk to file petition writ of certiorari out-of-time denied.").

On May 17, 1999 – two months after Eighth Circuit's mandate issued and was filed by the district court – the Minnesota Legislature overrode the governor's veto of a bill amending Minn. Stat. § 169.685 to allow evidence about seat belts in cases claiming seat belt defect. The statutory change, by its terms, applied only to actions "pending on or commenced on or after the effective date" of May 18, 1999. (Pet. App. Ex. A)

On May 30, 1999, petitioner sought to revive her finally-decided case by moving the Eighth Circuit to recall the mandate based on the new law. The Court denied the request on August 9, 1999. (Pet. App. A-25, A-40)

On June 9, 1999, after the time for certiorari had run, petitioner moved the district court under Rule 60(b) to vacate the affirmed and now-final judgment, so she could benefit from the new law. The district court denied the motion holding that the new statute on its face did not permit the relief sought: the new law applied only to "pending" cases, and petitioner's case was finally decided, not "pending." (Pet. App. A-40) Petitioner appealed the denial to the Rule 60(b) motion to the Eighth Circuit, which affirmed the district court in a an unpublished decision. (Pet. App. A-42) She sought rehearing and rehearing *en banc*, which were denied on September 19, 2000. (Pet. App. A-45)

REASONS TO DENY THE WRIT

None of the issues presented is proper for review. The first two – addressing the Eighth Circuit's unpublished affirmance of a Rule 60(b) denial – attack a fact-based exercise of discretion, quarrel with state law, and proposes an absurd reading of Rule 60(b). The final issue proposes constitutional questions never raised in the Eighth Circuit, untimely in any event, and ultimately absurd. We address the two sets of issues in turn.

I. The First Two Issues: There Is No Reason To Review The Eighth Circuit's Unpublished, Fact-Based Decision That Conflicts With Nothing.

Petitioner posits that a district court must exercise discretion under Rule 60(b) even if the statute urged as the basis for the Rule 60(b) motion allows no relief. That is an argument directed at a unique situation, and has no support anyway.

As petitioner acknowledges, Rule 60(b) is reserved for "extraordinary circumstances." By definition "extraordinary circumstances" are just that – extraordinary – and necessarily fact-based. This case proves the point, for the facts here are pretty unique and rarely occur. Petitioner cites no case quite like this: where a matter was dismissed in a decision that became final upon affirmance and issuance of the mandate, based on a concededly correct application of a state statute, which then changed after the decision, in an amendment that by its terms applied only to "pending" cases, and then petitioner sought to reopen the "non-pending" (Pet. 9) case based on the new statute that applied only to pending cases.

None of petitioner's cases involves a post-affirmance, post-mandate Rule 60(b) motion based on a statute that expressly applies only to "pending" cases. Indeed, one case denies Rule 60(b) relief when decisional law changes, even if the change is retroactive (much less when it is prospective).[2] Others involve new law applied to still-pending cases.[3] Still others involve statutory changes retroactive by their terms.[4] Another applies new

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[2] *See Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996).

[3] *See McGrath v. Potash*, 199 F.2d 166 (D.C. Cir. 1952) (injunction vacated); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 697 (10th Cir. 1989) (new law applied to case stayed pending arbitration); *Michigan Surety Co. v. Service Mach. Corp.*, 277 F.2d 531, 532 (5th Cir. 1960) (Rule 60(b) relief sought before appeal of judgment; new law applied on appeal); *Smith v. Holtz*, 879 F.Supp. 435, 438 (M.D.Penn. 1995) (Rule 60(b) relief sought while appeal pending); *Max M. v. Thompson*, 585 F.Supp. 317, 321 (N.D.Ill. 1984), *as amended*, 592 F.Supp. 145 (1984) (Rule 60(b) reconsideration of dismissed claims based on new law while other claims still pending); *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998) (Rule 60(b) request made while action still in district court; new law applied on appeal of both judgment and Rule 60(b) denial); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 929 (5th Cir. 1976) (Rule 60(b) motion made in district court while "appeal was still pending"). *See also Allen v. Shalala*, 835 F.Supp. 462, 464 (N.D.Ill. 1993) (Rule 60(b) proper remedy for "predicament" where fees denied without prejudice but because order non-final party "may neither appeal nor refile his fee petition" when new interpretation of "prevailing party" decided).

[4] *See In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 244 (9th Cir. 1988); *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986); *Yaris v. Special School District of St. Louis County*, 661 F.Supp. 996, 998 (E.D.Mo. 1987). *See also Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997) (retroactive constitutional decision permits reconsideration of habeas corpus denial, especially where in

law to ongoing conduct.[5] Another grants Rule 60(b) relief not because of legal change *per se* but because denying relief would mean opposite results in actions arising out of same incident, depending on whether the case remained in state or was removed to federal court.[6] Still another has nothing to do with a change in the law, but grants Rule 60(b) relief to resolve an inconsistency in court rulings.[7] If the cases show anything, they show that each Rule 60(b) case is unique, calling for fact-based exercise of discretion; review here would do little to guide courts in the exercise of that discretion in the future.

As to the exercise of discretion here, the courts did exactly what the state law at issue commanded. Minnesota Statute § 169.685's amendment expressly is prospective: it "applies to actions pending on or commenced on or after the effective date." (Pet. 4) The Court of Appeals applied the statute prospectively according to its terms, and declined to apply the statute to a case already finally decided and so not "pending." That is not radical, but just what the law requires: federal courts in diversity are required to apply state law as it is written. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). This Court does not sit to resolve issues of state law. *Pierson v. Ray*, 386 U.S. 547, 558, 87 S.Ct. 1213, 1219 fn. 12 (1967) ("we do not

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habeas corpus "conventional notions of finality have no place") (quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963)).

[5] *See Manhattan Cable Television v. Cable Doctor, Inc.*, 824 F.Supp. 34, 36 (S.D.N.Y. 1993).

[6] *Pierce v. Cook & Co.*, 518 F.2d 720, 722-23 (10th Cir. 1975).

[7] *Knox v. Lichtenstein*, 654 F.2d 19, 21 (8th Cir. 1981).

ordinarily review the holding of the court of appeals on a matter of state law").

Petitioner urges that her action was not "final" because although the mandate had issued, the time to file a certiorari petition had not yet run. But the meaning of "pending" under a Minnesota statute is a state law question. Moreover, even under federal law, a matter is "final" upon issuance of the mandate, which only can be stayed under F.R.A.P. 41(d) upon the showing of a "certworthy" issue. *See also Curry v. Baker*, 479 U.S. 1301, 1302, 107 S.Ct. 5, 6 (1986) (Supreme Court will stay mandate only if there is: (1) a reasonable probability that four justices will grant certiorari; (2) a significant possibility of reversal; and (3) a likelihood of irreparable harm if stay is not granted). Here, there was no certworthy issue; the original Eighth Circuit decision involved state-law interpretation, and petitioner did not raise the constitutional arguments she belatedly tried to put to this Court. In essence, petitioner proposes a right to file a frivolous petition, and to circumvent F.R.A.P. 41(d)'s requirements of a certworthy issue and a stay to avoid issuance of a mandate and finality. No case recognizes such a right.

In the end, the petition boils down to an argument that Rule 60(b) permits (or, as petitioner seems to suggest, requires) a district court to void an affirmed and final decision to allow application of a state statute that on its face does not apply. That is, if we may say so, an astonishing proposition. By definition, every party subjected to a Rule 12(b)(6) dismissal cannot "prosecute her claim on the merits" (Pet. 13), because the substantive law allows no relief. There is no discretion to grant relief where the law affords none. *See Koon v. United States*, 518 U.S. 81,

100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.") (citation omitted). Rule 60(b) is an extraordinary remedy for exceptional cases, not a free pass from controlling law whenever it provides no relief. Petitioner cites no case holding otherwise.[8]

There is nothing to review.

II. The Final Issue: Never Raised, Untimely And Absurd.

The final issue challenges the constitutionality of the original Minnesota statute, before its amendment. But that statute was not the basis for the Rule 60(b) motion sought to be reviewed; the amended statute was. Petitioner made no constitutional challenge to the original statute in the proceedings at issue here, and the Eighth Circuit had no occasion to address one. That alone makes review improper.

But there's more. In the case that did address the original statute, *Carlson v. Hyundai Motor Co.*, 164 F.3d 1160 (8th Cir. 1999), petitioner made no constitutional challenge to the statute either. Only after the time for certiorari ran did she imagine constitutional issues, and then sought to file an untimely petition that raised – essentially verbatim – the constitutional argument tendered here. This Court ruled: "Motion to direct the Clerk

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[8] Petitioner may think it harsh that she helped occasion the change in law but does not benefit from it. If so, her quarrel is with the legislature that made the law prospective only.

to file petition writ of certiorari out-of-time denied." *Carlson v. Hyundai Motor Co.*, 119 S.Ct. 2389 (June 24, 1999).

Thus, the supposed constitutional issue was never raised and untimely a year ago. It is doubly unraised and untimely now. She cannot revive it by the artifice of a Rule 60(b) motion (much less when the issue was not even raised in the Rule 60(b) proceedings). *Browder v. Dept. of Corrections, Illinois*, 434 U.S. 257, 263, 98 S.Ct. 556, 560 fn. 7 (1978), *reh'g denied*, 434 U.S. 1089, 98 S.Ct. 1286 (1978) (appeal from denial of Rule 60(b) motion does not open underlying judgment to review).

As to the merits of the unraised and untimely argument, there is nothing to review. Petitioner attacks the Minnesota law as a deprivation of equal protection and due process because it "eliminated her right to present the evidence/facts bearing upon her cause of action against the respondent." (Pet. 20) But Minnesota said she had no relevant "evidence" or "cause of action." Petitioner admits that a "state legislature has the power to prescribe new and alter existing rules of evidence, or to prescribe methods of proof . . . ". (Pet. 20) Yet, she essentially argues that states cannot make evidentiary rules or draw lines between claims that should and should not be permitted. She cites no support for that.[9]

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[9] Petitioner cites only constitutional boilerplate that has no bearing on, much less creates a conflict concerning, this issue. *See Pembina Cons. Silver Min. & Milling Co. v. Commonwealth of Pennsylvania*, 125 U.S. 181, 188-89, 8 S.Ct. 737, 740-741 (1888) (equal protection applies to corporations); *Galvan v. Press*, 347 U.S. 522, 530, 74 S.Ct. 737, 742 (1954), *reh'g denied*, 348 U.S. 852 (1954) (due process applies to aliens); *Matthews v. Eldridge*, 424

CONCLUSION

The Petition for Certiorari should be denied.

DATED: January 8, 2001

Respectfully submitted,

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U.S. 319, 339-40 (1976) (due process does not require hearing before termination of disability benefits); *Thompson v. City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 629 (1960) (criminal charges unsupported by evidence violate due process); *accord Garner v. State of Louisiana*, 368 U.S. 157, 173-74, 82 S.Ct. 248, 257 (1961).